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IN THE

# Supreme Court of the United States

October Term, 1960

No. 109

HENRY DUBOIS' SONS CO., INC.,
*Petitioner,*

AGAINST

HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,
*Respondent.*

## Brief of Respondent Hazel Dunbar in Opposition to the Petition of Henry DuBois' Sons Co., Inc. for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PAUL C. MATTHEWS,
J. JULIAN TASHOF,
NORMAN B. SOBLER,
*Attorneys for Respondent,*
11 Broadway, New York.

EDWIN M. BOURKE,
JOHN J. ROBINSON,
*Of Counsel.*

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WORTH 2-0689

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HAZEL DUNBAR, as Administratrix under limited letters of the Estate of ROBERT DUNBAR, deceased,
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## Brief of Respondent Hazel Dunbar in Opposition to the Petition of Henry DuBois' Sons Co., Inc. for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

### Statement of Facts
### and
### State of the Case

Plaintiff sued in United States District Court, Southern District of New York, under the Jones Act, 46 U. S. C. A. Section 688, to recover for the death of her husband Robert Dunbar, who was drowned when the wooden derrick barge *Trenton*, on which he was employed, capsized

while in tow and sank in the waters of Hempstead Harbor, New York. At the time of the casualty, about 1:30 A.M. on June 7th, 1955, Dunbar was the only person on the vessel, having been ordered by defendant-shipowner (petitioner), his employer, to go with the *Trenton* from her moorings at Roosevelt Street, East River, New York, at 9:00 P.M. on June 6th to Hempstead Harbor, where a new dredging job would be started the following morning.

The evidence at trial showed that Dunbar had put in a full days' work on June 6th and that, although he was ordered to ride the *Trenton* that night and go to work again the next day on the new job, no relief man was provided for the overnight trip.

It was established also by the plaintiff, through one of defendant's former employees who had worked on the *Trenton* for many years, that the vessel was in an advanced state of deterioration, particularly with respect to the caulking in her seams, in consequence of which she would take abnormal quantities of sea water while in tow. The Circuit Court states that plaintiff's "contention was supported by substantial evidence adduced at trial". 275 F. 2d 304, 305.

## The Verdict

After discussion of the subject with counsel, the trial judge submitted to the jury eight special interrogatories covering two phases of the case: liability and damages. These interrogatories are reproduced in respondent's appendix, pages 13-14.

It will be seen that the jury found defendant Henry DuBois' Sons Company liable on the grounds: (1) that its vessel *Trenton* was unseaworthy at the time of the sinking, in consequence of the negligence of defendant

DuBois, and (2) that these things contributed to the sinking and the loss of life of Robert Dunbar.

The jury found also that decedent Robert Dunbar had been negligent "in the performance of his duties aboard the *Trenton*", to the extent of 20%.

Judgment for the widow Hazel Dunbar and her infant child was entered in the sum of $62,000 as found by the jury. On appeal to the Second Circuit Court of Appeals, this judgment was affirmed, 275 F. 2d 304, February 1960; at the end of which decision (p. 307), the Court ordered that the wrongful death action be severed from a third-party action against the towing company, "so that plaintiff's judgment in the latter shall be presently payable". Petition for rehearing *en banc* was denied.

**The Petition Must Be Denied Because (1) the Petitioner Misconstrues the Verdict; (2) This Court in the *Tiller* Case, 318 U. S. 54, Rejects Petitioner's Argument That the Jury's Finding of Contributory Negligence Means That Decedent Breached His Contract of Employment.**

Petitioner rests its application to this Court, as it did in the Court of Appeals, on the argument that plaintiff is barred from recovery in this Jones Act suit because of the jury's finding of contributory negligence against plaintiff's decedent, on the theory that this constituted a breach by decedent of his contract of employment. Petitioner relies on the doctrine expounded in cases such as *Walker v. Lakes Bros. S.S. Co.*, 2 C. A., 1952, 193 F. 2d 772, and *Dixon v. United States*, 2 C. A., 1955, 219 F. 2d 10, to the effect that for the *non-performance* of an independent duty which causes damage to the employer, the employee may not recover for injury to himself. Petitioner reaches

this conclusion by a species of sophistry that transforms the essential nature of the jury's verdict.

We submit that, in order to obtain a writ of certiorari in *this* case, petitioner is bound to satisfy the Court that an ordinary jury finding of contributory negligence is equivalent to a finding *as matter of law* that the plaintiff has breached his employment contract.

Petitioner's argument rests, indeed *must* rest, on the findings of the jury as contained in answers to special interrogatories (see Resp. App., pp. 13-14); therefore, it is respectfully submitted that if this Court find, as we contend it should, that petitioner's interpretation of those findings is untenable, then there is no valid problem—certainly no "law" problem—stated or presented in the petition.

## The Meaning of the Verdict

We are dealing here with a common, every-day plaintiff's verdict in a Jones Act case, which verdict contained a finding of contributory negligence that diminished the recovery; but the petitioner's arguments take the verdict out of context and distort its meaning, so that the "Questions" posed to this Court in the petition (pp. 2-3) are specious.

The jury found that at the time she capsized the derrick barge *Trenton* was unseaworthy and that such unseaworthiness, coupled with the negligence of defendant shipowner DuBois Company which produced the condition, caused the sinking and loss of Dunbar's life (Resp. App., pp. 13-14).

In its Question 1 (Pet., p. 2) petitioner states that the jury "has found *specifically and expressly* that decedent's *breach of duty* was one of the causes of the sinking of his vessel and of his loss of life" (italics ours). When this ex-

travagant statement is compared with the literal text of Question No. 5 and the jury's answer.

> "Question No. 5—Was the deceased negligent in the performance of his duties aboard the *Trenton*? Answer—Yes."

it is manifest that the jury certainly did *not* find "specifically and expressly" that Dunbar was guilty of "breach of duty". On the contrary, they found that Dunbar *performed* the work but, in some way not stated, was careless.

Assuming *arguendo* that jury finding No. 5 means, as petitioner urges, that Dunbar "breached his duty" to his employer. This would still leave the finding of unseaworthiness of the vessel, which condition the jury found was brought about by the negligence of defendant ship owner, *not* by Dunbar the employee. The unseaworthiness was the underlying cause of the casualty; Dunbar's fault, at most, was secondary. If petitioner were right, what then becomes of the finding of fault against the ship owner defendant?

We say that the disposition suggested by petitioner would be intolerable, that it would make a mockery of the Jones Act and of the Federal Employer's Liability Act, the source statute.

> "Congress has twice acted to make controlling the rule of comparative negligence. Lodged with the courts is the duty to effectuate, not frustrate, this legislative command." 62 Yale Law Journal 111, 114.

**Petitioner's Charge of Breach of Duty Is Dilatory**

Ample opportunity at trial was open to petitioner, if it chose, to have requested a charge from the court to the effect that if the jury found that Dunbar's negligence constituted a breach of his employment contract, it could bring in a verdict in favor of petitioner. No such request was made.

> "It is indeed a part of the jury's duty to fix the standard of care which the circumstances should evoke in any given case; and there are no general rules to govern them in their choice. Nevertheless, that does not mean that a defendant may never demand that the judge shall separate different groups of facts and suggest that they may call for different standards."
>
> Judge Learned Hand, in *Walker* v. *Lykes Bros. S.S. Co.*, 2 C. A. 1952, 193 F. 2d 772, 775.

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Finally, where the defendant shipowner's negligence is found to be the underlying or proximate cause of the casualty, whatever degree of fault be found against the employee is no more than a contributing factor. Since that is the situation in the case at bar, it is impossible to invalidate the verdict on the ground that finding No. 5 constitutes a bar to plaintiff's recovery, because the negligence of the petitioner shipowner and the contributory fault of Dunbar are inseparably intermingled. *Chesapeake & Ohio Railway Co.* v. *Newman*, 243 F. 2d 804, 808 (6 C. A., 1957).

In its tortuous efforts to produce a meaning from jury finding No. 5 which cannot be spelled out of its plain language, petitioner betrays the difficulty which is the

root of its predicament: *that there is no jury finding* to support its point because no request was made by petitioner to the trial court for a special interrogatory framed to elicit a yes-or-no response as to whether or not, on the evidence adduced, there had been a breach of his employment contract by Dunbar.

**This Court in the *Tiller* Case Has Held That the 1939 Amendment to F. E. L. A. "Swept Into Discard" All Rules Except That of Comparative Negligence. One of These Was the "Primary Duty Rule," Which Petitioner Now Seeks to Invoke (Pet., p. 2).**

In 1943 this Court in *Tiller* v. *Atlantic Coast L. R. Co.*, 318 U. S. 54, 65, emphasized that the 1939 amendment to the Federal Employer's Liability Act

> "• • • Was clearly aimed at making the principles of comparative negligence the guiding rules of decision in accident cases. 'The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned.'" (The latter quotation from Senate Hearings.)

Lest there be any doubt that the rule of comparative negligence was intended by Congress to supplant all other "doctrines", this Court declared (ibid., p. 66):

> "The doctrine of assumption of risk can not be 'abolished in toto' and still remain in partial existence as the court below suggests. The theory

that a servant is completely barred from recovery for injury *resulting from his master's negligence*, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, *contrary to the will of Congress*, be allowed recrudescence under any other label in the common law lexicon. The Act of 1908 and the amendment of 1939 abolish the post-Priestly v. Fowler defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. *They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.*" (Italics ours.)

Again (ibid., p. 67):

> "* * * A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.'"

In a concurring opinion in the *Tiller* case, Mr. Justice Frankfurter declares (ibid., p. 72):

> "* * * The basis of an action under the Act remains the carrier's negligence."

Concerning the "primary duty" rule, this Court said (ibid., pp. 63-64):

> "* * * Aside from the difficulty of distinguishing between contributory negligence and assump-

> tion of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk" (citing cases).
>
> • • • • •
>
> "It was this maze of law which *Congress swept into discard* with the adoption of the 1939 amendment to the Employers' Liability Act." (Italics ours.)

In 1954 the 5th Circuit Court of Appeals, in *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F. 2d 290, dealt with a suit brought by a railroad brakeman who was injured in a collision between his train and another. At the trial the railroad's attorney had contended that plaintiff was bound under an operating rule of the railroad, that he was injured in consequence of non-compliance with the rule and, therefore he was not entitled to recover (which is virtually the contention of petitioner in the instant case).

In the *Johnson* case (p. 291), the requested jury instruction read:

> "Where a trainman has a personal duty to perform under the operating rules of the defendant railroad and fails in that duty, as a result of which he is injured, he is not entitled to recover under the Federal Employer's Liability Act, notwithstanding the fact that it was also the duty of other members of the crew to watch for an approaching train with which his train collided, and that their negligence may have contributed in a proximate way to the injury of the plaintiff."

The trial court declined so to charge, and it was upheld by the appellate court, which said (ibid., p. 292):

> " * * * Following the enactment of the 1939 amendment, the Supreme Court held that 'every vestige of the doctrine of assumption of risk was obliterated from the law' and that the 'primary duty rule' in Unadilla Valley Ry. Co. v. Caldine, supra, and Davis v. Kennedy, supra, had been 'swept into discard'. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 58, 63, 64, 63 S. Ct. 444, 446, 87 L. Ed. 610. Since that decision, in cases arising under the Federal Employer's Liability Act, even the engineer has been held not barred by the 'primary duty rule', Atlantic Coast Line R. Co. v. Mangum, 250 Ala. 431, 34 So. 2d 848, 852; Atlantic Coast Line R. R. v. Anderson, 200 Ga. 801, 38 S. E. 2d 610, see also Keith v. Wheeling & L. E. Ry. Co., 6 Cir., 160 F. 2d 654, 657. * * * "

The instant case was decided by a jury which answered specific interrogatories. The answers clearly find that the defendant was guilty of negligence in failing to furnish a seaworthy vessel. They also find that decedent was 20% responsible for the occurrence. This is a simple Jones Act situation, and the rule of comparative negligence would be rendered ineffectual if every seaman found guilty of contributory negligence was declared to have breached a contractual duty. The petitioner urges a turning back to the hard common law rule of no recovery because of contributory negligence in any degree.

The Court of Appeals unanimously held that the *Walker* doctrine did not bar recovery in this case and a petition for rehearing was denied by five Court of Appeals Judges.

In discussion under the heading, "Reasons for Granting of Writ" (Pet., pp. 8-9), petitioner cites a number of decisions rendered by this Court in FELA cases in support of its contentions that recovery in this case is barred by reason of plaintiff's decedent's breach of his employment contract.

It is to be noted that *all* of the cases cited came before this Court and were decided before 1939, the year in which Congress amended the Federal Employer's Liability Act; indeed, the most recent before 1939 was the case of *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313, decided in 1932.

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## Question No. 2 (Pet., p. 2)

## Comment Concerning 18 U. S. C. A., Section 2196 (Pet., p. 10)

This is "new matter," never before raised by petitioner. We shall not labor the point that this statute is clearly inadmissible for these reasons:

(1) Dunbar was not employed on a merchant vessel, as that term has been judicially defined. *Adams* v. *United States*, D. C. Mass., 1922, 281 Fed. 895, 896.

(2) Since the statute is penal in nature, in no event could it be material or relevant unless and until it were shown that decedent Dunbar had been *convicted* of violating it. This was not possible, because Dunbar died of drowning when the *Trenton* capsized.

## The Motion by Petitioner for Judgment N. O. V. Was Properly Denied

It is contended (Pet., pp. 13-14), that after the verdict was returned, the petitioner's motion for judgment n. o. v.

should have been granted because only a naked question of law was then before the Court; citing a decision of this Court, *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243. This citation does not sustain petitioner's position; on the contrary, it supports that of respondent, for the reason that judgment n. o. v. *cannot* be granted where the verdict is based on substantial evidence, as the Court of Appeals holds it was in this case, 275 F. 2d 304, 305.

*Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 251 (1940);

*Danko v. Leary*, 149 F. 2d 66, 68, C. C. A. 3 (1945);

*Barron & Holtzoff*, Vol. 2, Sec. 1079, p. 774.

### Comment Concerning Indemnity

Under subhead 3 (Pet., pp. 12-13) petitioner discusses the subject of indemnity. Since, as we have shown in this brief, petitioner's whole argument is grounded on a forced interpretation of jury finding number 5 (Resp. Br., pp. 4-5), the matter of indemnity becomes academic.

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## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

PAUL C. MATTHEWS,
J. JULIAN TASHOF,
NORMAN B. SOBLER,
*Attorneys for Respondent.*
11 Broadway, New York.

EDWIN M. BOULKE,
JOHN J. ROBINSON,
*Of Counsel.*

## APPENDIX

### The Jury's Verdict and Findings

The Jury will render a Special Verdict answering the following questions by their unanimous vote—

Question No. 1:

Was the derrick barge *Trenton* in an unseaworthy condition because of the negligence of the DuBois Company?

Answer: Yes.

Only if your answer was in the affirmative, answer.

Question No. 2:

Did this unseaworthy condition in whole or in part contribute to occasioning the sinking of the *Trenton* and the drowning of deceased Robert Dunbar?

Answer: Yes.

Question No. 3:

Were the agents or employees (other than the deceased) of Henry DuBois Sons Co., the owner of the *Trenton*, negligent in the maintenance and operation of the derrick barge *Trenton?*

Answer: Yes.

Questions No. 4:

Did such negligence of Henry DuBois Sons, Co., in whole or in part contribute to occasioning the sinking of the *Trenton* and the drowning of the deceased?

Answer: Yes.

Question No. 5:

Was the deceased negligent in the performance of his duties aboard the *Trenton?*

Answer: Yes.

*The Jury's Verdict and Findings*

Question No. 6:

Did such negligence of Robert Dunbar contribute in whole or in part to occasioning the sinking of the *Trenton* and his drowning?

Answer: Yes.

Only if your answer to question number 6 was in the affirmative answer—

Question No. 7:

State in what percentage you find that such negligence of Robert Dunbar did contribute to occasioning his drowning.

Answer: 20%.

Question No. 8:

A. What was the total pecuniary loss sustained and suffered by the widow of Robert Dunbar, as a result of his drowning?

Answer: A. $42,000 (Forty-two thousand).

B. What was the pecuniary loss sustained and suffered by the daughter of Robert Dunbar, as a result of his drowning?

Answer: B. $20,000 (Twenty thousand).

The above quoted amounts of $42,000 and $20,000 represents the final net amount *after deducting* the 20% due to the negligence of the deceased.